IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 19TH SEPTEMBER 2007 / 28TH BHADRA 1929

CRL.A.No. 1578 of 2005()

CC.47/2001 of ENQUIRY COMMR. & SPL.JUDGE, KOZHIKODE

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APPELLANT: 1ST ACCUSED:

SOLOMAN, S/O. JOSEPH,
MAKKALIL HOUSE, ELAVAYAL P.O., PUTHUMALA,
VELLARMALA AMSOM, MEPPADI, WYNAD DISTRICT
(OVERSEER/DRAUGHTSMAN, IRRIGATION
SUB-DIVISION, SULTAN BATHERY).

BY ADVS. SRI.M.ASOKAN
SRI.DEVAPRASANTH.P.J.

RESPONDENT: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
DY.S.P., VIGILANCE AND ANTI-CORRUPTION
BUREAU, WYNAD, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI. S. DILEEP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/06/2007 ALONG WITH CRA NO. 1658 OF 2005 THE COURT ON 19/09/2007 DELIVERED THE FOLLOWING:

ORDER IN CRL. M.A.NO.14850 OF 2005 IN CRL. APPEAL NO. 1578 OF 2005.

DISMISSED

19.9.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NOS. 1578 & 1658 OF 2005

Dated this the 19th day of September, 2007

JUDGMENT

Accused Nos. 1 and 2 in C.C. No.47 of 2001 on the file of the Enquiry Commissioner and Special Judge, Kozhikode (VC 10 of 2000 of V.A.C.B., Wayanad) are the appellants. They faced trial for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act") read with Section 34 I.P.C.

2. The prosecution allegation against accused Nos.1 and 2 was that while they were working as Overseer in the Minor Irrigation Sub-Division, Sulthan Bathery and Assistant Engineer, Karapuzha Irrigation Project, Sulthan Bathery respectively, they demanded an amount of Rs.1000/- as illegal gratification on 24.7.2000 at about 10.30 a.m. from PW.1 who was the convener of the People's Programme of Nenmeni Grama Panchayat for the preparation of the final bill in order to get the payment for the construction of a kitchen for the Anganvadi building at Thekkankolly. It

was the further case of the prosecution that on 26.7.2000 at about 6.45 p.m. at the quarters of the second accused, the first accused accepted an amount of Rs.1000/- from PW.1 and both the accused shared the said amount. To prove the above charges against the accused, the prosecution examined PWs.1 to 9 and produced Exts.P1 to P15 as well as MOs.1 to 13. On the side of the defence DW.1 was examined and Exts.D1 to D5(a) were produced. On closing the prosecution evidence, the accused were questioned under Section 13 Cr.P.C. Denying the prosecution allegations, both the accused filed their respective statements. The first accused stated that he and the second accused were working in the Irrigation Department and not under the Panchayat and that the Irrigation Department was not meeting their travelling expenses in connection with the work of supervision and check measurement at the work site where the kitchen was being constructed. He further stated that when he enquired about the expenses, he was told by the Secretary of the Panchayat that the expenses shall be met by PW.1 from the amount sanctioned for the construction work. It is further stated in the statement that the first accused incurred an expense of Rs.600/- and the second accused incurred an expense of Rs.400/- in connection with their visit to the work site and that PW.1 had agreed to pay the amount. He further stated that on the basis of the agreement, he accepted Rs.1000/- from PW.1 and had taken Rs.600/- as his

share and gave Rs.400/- to the second accused. The second accused, on the other hand, stated he had not accepted any bribe from PW.1, but had received an amount of Rs.400/- from the first accused who had borrowed the said amount from him. However, the trial court, relied on the evidence adduced by the prosecution and found both the accused guilty under Section 7 of the P.C. Act, convicted them thereunder and sentenced them to undergo rigorous imprisonment fort three years each and to pay a fine of Rs.10,000/- each and in default of payment of fine, to undergo simple imprisonment for a further period of one year each. The accused were also allowed the benefit under Section 428 Cr.P.C. The above conviction and sentence are challenged in these appeals.

3. Heard the learned counsel appearing for the appellants as well as the learned Public Prosecutor.

4. Sri. M.K. Damodaran, learned senior counsel appearing for the appellant in Cr.Appeal No.1658 of 2005 and Sri. M. Asokan, learned counsel appearing for the appellant in Crl. Appeal No.1578 of 2005 have raised the following contentions in challenging the judgment of the trial court: (i) the trial court committed serious error in accepting the case of the prosecution as the evidence of PWs.1, 3 and 8 would not show that the

appellants have committed any offence as alleged by the prosecution, (ii) the evidence of PWs.1 and 3 would not show that the appellants had demanded bribe as the case set up by the appellants would show that the amount received by them was in connection with the travelling expenses incurred by them for supervision and check measure at the work site and that as per the provisions of the People's Programme scheme itself, the appellants are entitled to such expenses, (iii) the evidence of PW.2 would show that the appellants were not entitled to any get any benefit from their department for the work entrusted to them under the Panchayat, they were not entitled to use the departmental vehicle and Ext.D4(b) would show that the expenses for supervision, measurements and preparation of bills shall be met from the total estimate amount, calculated at the rate of 1.5%, subject to a minimum of Rs.100/- and a maximum of Rs.1000/-. (iv) the trial court went wrong in accepting the evidence of PWs.3 and 8 regarding recovery of MO.1 and Mo.2 series of currency notes as the evidence of PW.1 itself shows that there was no demand for bribe and he had deviated from his earlier statement given to PW.8 and (v) mere recovery of currency notes from the accused will not prove them guilty of the offence as the explanation offered by the appellants would show that they were entitled to the amount towards travelling expenses and if so, the presumption under Section 20 of the P.C. Act cannot be drawn against the

appellants.

5. Before considering the contentions raised by the learned counsel appearing for the appellants, it is proper for this Court to peruse Ext.D4 scheme in which the execution of the work of People's Programme is detailed. Chapter VI of the scheme provides for execution of work in Municipalities, Corporations and Panchayats. In Ext.D4(b) the schedule of work and its expenses are appended and at page 55 of the scheme it is stated the expenses for supervision, measurements and preparation of bills would be paid from the estimate amount at the rate of 1.5%, subject to a minimum of Rs.100/- and a maximum of Rs.1000/-. Admittedly, both the appellants were not working under the Panchayat. They were working under the Irrigation Department. The trial court had accepted the evidence of PWs.1, 3, 8 and 9 and found that the appellants received an amount of Rs.1000/- from PW.1 on 26.7.2000.

6. The question to be considered in these appeals is whether the finding of the trial court that the first accused received an amount of Rs.1000/- from PW.1 as illegal gratification is sustainable or not.

7. PW.1 deposed before the court below that he had undertaken to

construct a kitchen in the Anganvadi building and that as per the budget approved by the Panchayat, the kitchen had to be constructed at a total construction cost of Rs.15,000/- out of which he received an initial payment of Rs.3700/- and that the balance amount will be paid only after production of the completion certificate. He further stated that the work had to be supervised by the first accused (appellant in Crl. Appeal No.1578 of 2005) and check measured and certified by the second accused (appellant in Crl. Appeal No.1658 of 2005). This witness further stated that on completion of the work, he took the first accused at the work site and subsequently met both the accused – appellants three or four times and that the first accused asked him to give them a treat for getting the bill signed. This witness further stated that he informed the first accused that he had only Rs.300/- with him at that time and that the first accused demanded an amount of Rs.1000/- as illegal gratification for the preparation of the final bill. He further stated that as he was not willing to give bribe, he again met both the accused – appellants on 24.7.2000 at about 10.30 a.m. at the office of the first accused and on that day also the first accused demanded an amount of Rs.1000/-. According to PW.1, aggrieved by the demand made by the first accused, he gave Ext.P1 statement before PW.8 and that on the advise of PW.8 he met both the accused again and that the first accused asked him to come to the house of

the second accused on 26.7.2000 in the evening with Rs.1000/-. He further stated that he informed PW.8 about the meeting and as instructed by PW.8, he produced ten currency notes of hundred rupee denomination before PW.8 who, after demonstrating the phenolphthalein test on a ten rupee currency note, applied phenolphthalein power on MO.1 and MO.2 series of currency notes, noted the number of the currency notes and handed over the marked currency notes to him as per Ext.P2 mahazar with a direction to give the same to the accused on demand. Further, PW.1 stated that he met the first accused as directed, asked him regarding the bill whereupon the first accused asked him whether he had brought the money. PW.1 stated that he handed over the currency notes to the first accused and that as soon as the first accused accepted the money, he gave a signal to PW.3, the trap witness who in turn gave the signal to PW.8 and the other officials whereupon the officials entered the room and took the marked currency notes from the pockets of the accused. This witness also stated that the currency notes recovered from the accused when subjected to phenolphthalein test gave positive result. When PW.1 was cross-examined, he had admitted that the office of the first and second accused was at Sulthan Bathery and that the work site was 15 Kms. away from the office. Her also stated that a two wheeler was necessary to reach the work site and that Rs.150/- had to be paid as travelling expenses. When a

specific question was put to this witness regarding the number of visits made by the first accused to the work site, he stated that he had taken the first accused to the work site only once and that he was not in a position to say whether the first and second accused had visited the work site more than once. PW.1 also admitted that the expenses incurred by the accused was included in the budget amount sanctioned by the Panchayat. In this context, this witness also admitted that the first and second accused incurred an expense of Rs.600/- and 400/- respectively. He also stated that " ജീപ്പ് വാടക ഇനത്തിൽ **A1 600** രൂപയും **A2 400** രൂപയും ചിലവാക്കിയിര ുന്നു എന്നു പറഞ്ഞാൽ ശരിയല്ലേ**?** എിക്കറിയില്ല. ഞാൻ കൊ ണ്ടു പോയതിന്റെ തുക ഞാൻ കൊടുത്തു. **(A)** അങ്ങനെ **A1** ഉം **A2** ഉം ചെലവാക്കിയ പണം അവർക്ക് മടക്കിക്കൊടുക്കാൻ വേണ്ടി **A1** ഉം **A2** ഉം ആവശ്യപ്പെട്ടിരുന്നു ് എന്നു പറയുന്നു**?** ശരിയല്ല. **(A)** അങ്ങനെ ആവശ്യപ്പെട്ടിര ുന്നു എന്ന ും അത് **final bill** എഴുതുബോൾ നിങ്ങൾ കൊടുക്കാമെന്ന് പറയുകയാണുണ്ടായത് എന്നും പറയുന്നു**?** ശരിയല്ല. **(A)** നിങ്ങളോട് ആദ്യമായി **A1 1000** രൂപ ആവശ്യപ്പെട്ടത് എന്നാണ്**?** ക്രത്യമായി ഓർക്കുന്നില്ല. **(A)"**

8. In the light of the suggestion put to this witness, this Court has to look into the evidence of PW.2, the Head Clerk, Minor Irrigation Sub-Division, Sulthan Bathery. This witness had categorically stated that as per Ext.P3 check measurement book, the accused had gone to the work site

and check measured the work. He also stated that the first and second accused would not get any benefit from their department for the above work and that they were also not expected to use the departmental vehicle. He also stated that Ext.D2 final bill was in the handwriting of the first accused and all the measurements of the work were prepared by the first accused. The number of visits made by the first accused to the work site is not discernible from Ext.P3. The trial court, though considered this aspect, proceeded on the basis of the evidence of PW.1. It is also to be noted that PW.1 had not stated the exact dates on which the first accused had demanded bribe as alleged by the prosecution. Even in Ext.P1 such dates are not mentioned. Even though the trial court relied on the evidence of PWs.3 and 8 to prove the recovery of the marked currency notes from the accused, there is nothing in their evidence to show that the first accused had demanded bribe from PW.1 on 26.7.2000. PW.3 had stated before the trial court that though he had accompanied PW.1 to the place of occurrence, he was waiting outside the quarters of the second accused and got the signal from PW.1 about 5 to 10 minutes later and it was thereafter that he, PW.8 and other police officials went near the first accused and that it was at that time that PW.8 had introduced the first accused to him. This witness also stated that he had seen CW.2 taking six currency notes of hundred rupee denomination from the pocket of the first

accused. Ext.P7 is the recovery mahazar. PW.3 also stated that when PW.8 questioned the first accused regarding the balance amount, the first accused stated that he had given the same to the second accused. He also spoke about the phenolphthalein test conducted on the marked currency notes. This witness had not stated that he had heard any conversation between the first accused and PW.1. That being so, the evidence of PW.1 regarding the demand made by the first accused on 26.7.2000 has not been proved. This Court has already found that PW.1 had not given any evidence regarding the exact dates on which the first accused had demanded bribe from him. In this context, the evidence of PW.8 is also relevant. PW.8 had arranged the trap. He had stated before the court that he had prepared Ext.P1 first information statement of PW.1 on 26.7.2000. He also spoke about the phenolphthalein test conducted on a ten rupee note as well as on MO.1 and MO2. series of currency notes. He also stated that after getting the signal from PW.1 he went to the room and asked PW.1 to whom he had given the money and that PW.1 pointed towards the first accused. This witness further stated that CW.2 had recovered six marked currency notes from the pocket of the first accused. The evidence of this witness also would not show that the first accused had demanded bribe from PW.1 on 26.7.2000. His evidence would only show that PW.1 pointed towards the first accused as the person to whom he had

given the currency notes. In the above circumstances, the case set up by the appellants when questioned under Section 313 Cr.P.C. assumes relevance.

9. The specific case set up by the first accused before the trial court was that the amount of Rs.1000/- which he had accepted from PW.1 was towards the travelling expenses which he and the second accused incurred in connection with their visit to the work site. Though in the statement filed by the second accused (appellant in Crl. Appeal No.1658 of 2005), he had stated that Rs.400/- which he received from the first accused was repayment of the amount which the first accused had borrowed from him on an earlier occasion, the evidence adduced and the case set up by both the accused - appellants would show that Rs.1000/- accepted by the first accused was towards the travelling expenses incurred by both the accused. In this context, the trial Judge had not considered the provisions contained in Ext.D4(b) People's Programme scheme under which the work was executed. In this regard, the trial Judge committed serious error in accepting the evidence of PW.9. This witness who had investigated the case to a certain extent stated that no Government employee is entitled to any benefit for the expenses incurred by them for taking measurements of the work at a work site. This witness also stated that the appellants were

entitled to use Government vehicles to go to the work site for taking measurements. PW.9 further stated that he had not verified as to what would be the actual travelling expenses and that he had not made any enquiries regarding the expenses incurred by the accused. The evidence of this witness is contradictory to the evidence of PW.2 who had stated before the court that the accused were not permitted to take Government vehicles to visit the work site. This aspect was not properly considered by the trial Judge. In this context, the evidence of PW.5, the Secretary of Nenmeni Grama Panchayat is also relevant. He has stated that 2 ½ % of the estimate amount would be given to the officials as incentive. He further stated that if the officials are Government servants, 1 ¼ % of the estimate would be given to the Government servants and the remaining 1 ¼ % would be given to the Government. He also stated that the officials were not permitted to take the vehicles of the Panchayat for visiting the work site inspite of the request made by PW.1. This witness also stated that as per Ext.P3 Measurement book, the accused had check measured the work. He also admitted that supervision had to be done at every stage of the work.

10. In the above circumstances, this Court is of the view that the trial court had not considered the case set up by the accused – appellants

when they were questioned under Section 313 Cr.P.C. in the light of Ext.D4 scheme. If that be so, the finding entered by the trial court that the amount accepted by the first accused – appellant in Cr. Appeal No.1578 of 2005 was illegal gratification is not supported by any legally acceptable evidence. It can also be seen from the records produced by the appellants and also from the case set up by them that they were entitled to travelling expenses. It was also admitted by PW.1 that he had taken the first accused to the work site only once and that he was not in a position to say whether the appellants had visited the work site more than once. There is no evidence that the first accused – appellant in Crl. Appeal No.1578 of 2005 had made any demand for the bribe and hence the presumption drawn by the trial court under Section 20 of the P.C. Act is not correct. The first accused had offered an explanation to PW.8 for the amount which he had accepted from PW.1 on 26.7.2000. Though the evidence of PWs.3 and 8 would prove that an amount of Rs.600/- was recovered from the pocket of the first accused and Rs.400/- was recovered from the pocket of the second accused and that those currency notes were the same currency notes produced by PW.1 before PW.8, the recovery by itself will not prove that the appellants had accepted any bribe from PW.1 as contemplated under Section 20 of the P.C. Act. This point was considered by the Apex Court in the decision reported in **Subash Parbat Sonvane v.**

State of Gujarat, A.I.R. 2003 S.C. 2169. In the above judgment, the Apex Court had held that mere recovery of the marked currency notes by itself will not prove acceptance of bribe. Further, this point was considered by the Apex Court in the decision reported in **Om Parkash v. State of Haryana (2006) 2 S.C.C. 250**. In the said judgment, the Apex Court held that **"the defence story set up by the appellant cannot be said to be wholly improbable as it is not a cases where the burden of proof was on the accused in terms of Section 20 of the Act. Even otherwise, where demand has not been proved, Section 20 will also have no application."** In the decisions reported in **Union of India v. Purnandu Biswas (2005) 12 S.C.C. 576** and **T. Subramanian v. State of T.N.(2006)1 S.C.C. 401** also, the Apex Court had taken the same view.

11. In the light of the principles laid down by the Apex Court in the decisions referred to above, this Court is of the view that mere recovery of the marked currency notes from the appellants will not prove that the appellants committed offence punishable under Section 7 of the P.C. Act. Accordingly, the conviction entered and the sentence awarded by the trial court against the appellantsare set aside. The appellants are found not guilty and they are acquitted of the charges levelled against them.

The Crl. Appeals are allowed. The bail bonds executed by the appellants shall stand cancelled. It is also made clear that amount, if any, deposited by the appellants shall be refunded to them as per law.

(K.THANKAPPAN, JUDGE)

sp/

THANKAPPAN, J.

CRL.A. NO.

JUDGMENT

SEPTEMBER, 2007